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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1622

WILLIAM E. KIRWAN, Superintendent of the New York State Police,

Appellant,

vs.

DONALD F. ROMANO,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM

MICHAEL J. HUTTER,
Western New England Law School,
1215 Wilbraham Road,
Springfield, Massachusetts 01119,

CHRISTIAN G. KOELBL III,
1800 One M & T Plaza,
Buffalo, New York 14203,

Attorneys for Appellee.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-0457

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Appellee respectfully submits that the judgment of the District Court is so plainly correct as not to require plenary review. Accordingly, pursuant to Rule 16(1)(d) of the Rules of this Court, appellee moves that the judgment be summarily affirmed.

Alternatively, in light of this Court's recognition of the importance of the issues raised in this case by reason of its grant of certiorari in *Dwen v. Barry*, No. 74-1269 (certiorari granted May 27, 1975), appellee respectfully suggests that

it may be appropriate for this Court to order the two cases argued together as one case pursuant to Rule 43(5) of the Rules of this Court.

Statement of the Case

I. The Context and Commencement of This Litigation.

Appellee is a New York State Policeman holding the rank of Trooper.* Appellant was Superintendent of the New York State Police at the time the instant action was commenced and at all times prior thereto which are relevant to this action.

Prior to October 12, 1973, appellant promulgated Section 4.18 of Part III of the New York State Police Manual (hereinafter "Section 4.18"), which is presently in force and effect and which provides as follows:

> All members, both Uniform and Bureau of Criminal Investigation, shall adhere to these guidelines and criteria. Members may be excluded from these limitations by Troop or Detail Commanders when special assignments require deviation.
>
> a. Hair will be neatly groomed and tapered and will not fall over the ears or eyebrows or touch the collar except for the closely cut hair at the back of the neck. The bulk or length of hair will not interfere with the normal wearing of all emergency or Division headgear.
>
> b. Sideburns will be neatly trimmed and will not be of the muttonchop or flared type. The base of the sideburns will be clean-shaven on a horizontal line and shall not extend below the lowest part of the exterior ear opening.

* The facts stated in this and the next two paragraphs are set forth in Paragraphs 2, 3, 4, 5, 7 and 8 of appellee's Complaint and admitted in appellant's Answer.

> c. The face will be clean-shaven except that mustaches will be permitted. If worn, mustaches will be kept neatly trimmed and shall not extend beyond the corners of the mouth nor fall below the center line of the lips.

On October 12, 1973, one of appellee's commanding officers orally ordered him to bring himself into compliance with the requirements of Section 4.18. On October 18, 1973, appellant caused to be served upon appellee two charges arising out of his alleged failure to comply with the requirements of Section 4.18. If appellee were to be found guilty on either of the charges, he would be subject to certain penalties, including dismissal from the State Police.

On December 31, 1973, appellee commenced this action under 28 U.S.C. §§ 1331(a) and 1343(3), alleging the unconstitutionality of Section 4.18. By agreement between the parties, an administrative hearing as to aforementioned charges against appellee was adjourned pending the outcome of this action. On April 24, 1974, the District Court, Curtin, J., granted appellee's motion to convene a three-judge court. *Romano v. Kirwan,* Civil No. 1973-629 (W.D. N.Y., April 24, 1974).

II. The Trial.

A trial in this case was held on May 29, 1974, before the District Court, Curtin, J. Appellant presented testimony with respect to three state interests allegedly furthered by Section 4.18: (1) safety of the State Policeman in carrying out his duties; (2) public cooperation with State Policemen; and (3) discipline among State Policemen.

The Chief Inspector of the State Police, Daniel A. Dakin, testified as to several safety reasons. He stated that the wearing of sideburns or a beard (but not long hair or a

mustache) might possibly interfere with the seal necessary for the proper wearing of a gas mask. Tr. 18, 26-27, 86, 88.* He further testified that long hair could be used as an effective weapon by an assailant and that, by falling into a policeman's eyes, it could obscure his sight while he was trying to use a firearm. Tr. 27-30.

With respect to the second state interest allegedly furthered by Section 4.18, Mr. Dakin stated that, in his opinion, a neat personal appearance by State Policemen was needed, especially in rural areas, to obtain public cooperation. Tr. 31-32.

As to discipline, no testimony was offered as to how Section 4.18 advanced this state interest. The only reference to discipline was made in appellant's Exhibit 6, Tr. 106-107, an internal memorandum of the Division of State Police which, in recommending promulgation of personal appearance guidelines, referred to the Division as "semi-military in organization" and as having a "need to inspire a sense of pride and self-discipline in our members [which] closely parallels those of the military."

Appellee, a member of the New York State Police for twelve years, testified in his own behalf. It was noted by the District Court that he had sideburns even with the lower lobe of his ear, that his mustache was approximately one-sixteenth to one-eighth of an inch below his upper lip and that the back of his hair was slightly over his collar, straight and neat. Tr. 177.

Finally, State Policeman James Kleinsmith testified in support of appellee. Mr. Kleinsmith, who had recently served in a rural area, stated that the style in which he was

* References beginning with the abbreviation Tr. are to pages of the transcript of the trial.

wearing his hair and mustache (similar to that of appellee) had "more or less helped me rather than hindered me in my personal dealings with the public." Tr. 193.

III. The District Court's Opinion and Judgment.

In an opinion dated March 4, 1975, which is reported at 391 F.Supp. 643, the District Court held Section 4.18 unconstitutional. The District Court dealt with three points raised by appellant in this Court.

First, the District Court held that appellant had failed to prove a waiver of appellee's right to bring this action under the standard set forth in *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972). 391 F.Supp. at 644.

Second, citing *Dwen v. Barry*, 483 F.2d 1126 (2d Cir. 1973), the District Court recognized the right of a man to choose the length and style of his hair, sideburns and mustache and held that any restriction by the state on this choice of personal appearance must be justified by a legitimate state interest reasonably related to the regulation. 391 F.Supp. at 645.

Lastly, the District Court rejected on factual grounds the three state interests advanced by appellant to justify Section 4.18's restriction of appellee's right to style his personal appearance. With respect to the safety argument, the court reviewed various internal documents and memoranda of the Division of State Police and determined that safety factors had never been considered by appellant prior to the promulgation of Section 4.18. *Id.* at 645-647. Moreover, the court rejected the presently proffered safety factors, finding that they were not supported by appellant's proof. *Id.* at 646-647. As to the remaining interests, the court found that there was no evidence that Section 4.18

furthered the discipline of, or encouraged public cooperation with, State Policemen. *Id.* at 647.

On March 6, 1975, the District Court entered judgment in favor of appellee and against appellant, declaring Section 4.18 unconstitutional, void and of no effect and permanently enjoining appellant from enforcing it.

ARGUMENT

I. A policeman has a constitutional right to choose the length and style of his hair, sideburns and mustache.

This Court has not confronted the issue whether or not a man has a constitutional right to determine the length and style of his hair, sideburns and mustache. *See, e.g., Kahl v. Breen,* 398 U.S. 937 (1970), *denying cert. to* 419 F.2d 1034 (7th Cir. 1969); *but see Dwen v. Barry,* No. 74-1269, *granting cert. to* 508 F.2d 836 (2d Cir. 1975). This Court has frequently recognized, however, that there exists a constitutional right to make a particular decision pertaining to one's own person. A recent example of such recognition appears in *Roe v. Wade,* 410 U.S. 113 (1973), in which it was held that the right of a woman to decide whether or not to terminate her pregnancy is a "liberty" protected by the Due Process Clause of the Fourteenth Amendment.

The issue whether or not a man has a constitutional right to style his personal appearance may seem to be insignificant, particularly when measured against the question whether or not a woman may have an abortion. In reality, however, both questions are particular applications of the same broader issue—whether or not an individual has the right to make decisions pertaining to his or her own

person which have no direct bearing on the ability of others to exercise their rights. As to this broader question, writing in a different context in a case cited in *Roe v. Wade, id.* at 152, this Court many years ago indicated its basic viewpoint as follows:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone."
>
> *Union Pacific Ry. v. Botsford,* 141 U.S. 250, 251 (1891).

Viewing the issue in this framework, a number of courts have held that an individual has a constitutional right to style his or her personal appearance. *E.g., Dwen v. Barry, supra,* 483 F.2d at 1130 (citing other cases). *Dwen* found the right to exist under the Due Process Clause of the Fourteenth Amendment; other courts have looked to other constitutional guarantees. *Id.* Nevertheless,

> . . . the differences in approach are more semantic than real. The common theme underlying decisions striking down hairstyle regulations is that the Constitution guarantees rights other than those specifically enumerated, and that the right to govern one's personal appearance is one of those guaranteed rights.
>
> *Bishop v. Colaw,* 450 F.2d 1069, 1075 (8th Cir. 1971).

Appellee respectfully submits that the decisions of lower federal courts holding that the right to style one's personal appearance is constitutionally protected are consistent with and follow from prior decisions of this Court.

Citing *Stradley v. Andersen,* 478 F.2d 188 (8th Cir. 1973), appellant disputes that the Constitution protects the

right of a police officer to style his or her personal appearance. In effect, appellant would deny appellee this right on the basis of appellee's status. *Dwen* explicitly held that one's right to regulate one's personal appearance is independent of one's status. 483 F.2d at 1130 n.9. Specifically, it refused to extend to police organizations "the unique judicial deference accorded to the military" in matters declared by the military establishment to affect the effectiveness of the performance of its military functions. *Id.* at 1128. Appellee respectfully submits that *Dwen* was correct in this respect. This Court's decision in *Garrity v. New Jersey*, 305 U.S. 493 (1967), clearly establishes that an individual does not forfeit his or her constitutional rights when he or she joins a police force.

II. Appellant has not made the factual showing necessary to justify the infringement by Section 4.18 of appellee's right to choose the length and style of his hair, sideburns, and mustache.

Appellee does not contend that an individual's right to style his or her personal appearance is absolute. To the contrary, appellee recognizes that this right may be infringed by the state upon a sufficient *factual showing* of genuine need. As stated in *Dwen v. Barry, supra*, 483 F.2d at 1130, "[l]imitation of such a right requires some showing of public need."

Dwen held that "a legitimate state interest reasonably related to the regulation" is required to justify a restriction of one's right to style one's personal appearance, *id.*, and this standard was applied by the District Court in this case. 391 F.Supp. at 645. Appellee contends that, as in *Roe v. Wade, supra*, 410 U.S. at 155, a "compelling state interest" must be shown before the right may be limited. For purposes of this motion, however, it is not necessary to determine the standard against which the interests asserted by appellant must be measured. As the District Court concluded, Section 4.18 fails to pass constitutional muster even under the less strict standard.

The District Court agreed with appellant that the three interests alleged to be furthered by Section 4.18—safety of, discipline among and public cooperation with State Policemen—are legitimate state interests. 391 F.Supp. at 645. Disagreeing with appellant, however, it held that these interests are not reasonably related to Section 4.18. *Id.* at 647. An analysis of the District Court's opinion in light of the record shows that this holding and the findings of fact upon which it is based are plainly correct and clearly not erroneous.

1. Safety.

Preliminarily, appellant argues that the District Court failed to deal with the state's interest in safety because the court found that safety had not been considered in the promulgation of Section 4.18. Appellant's Jurisdictional Statement 11-13. Appellant's argument simply misstates the District Court's opinion. True, the court found that safety factors were not considered by appellant in drafting Section 4.18. 391 F.Supp. at 645-47. Its opinion clearly reveals, however, that it reviewed each factor individually to determine whether or not the factor was reasonably related to Section 4.18 and that it found each factor not so related. *Id.* at 646-47.*

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* After rejecting safety as a consideration in the drafting of Section 4.18, the District Court found that "the true motivation for the promulgation of Section 4.18 was a desire for uniformity of appear-

(Footnote continued on following page)

Turning first to the gas mask issue, the District Court found "that neither mustaches nor hair length interfere with the gas mask seal and that there is only a possibility that sideburns could interfere with the seal . . . ." *Id.* at 646. Furthermore, the court found that "there is no proof that the sideburn length specified in Section 4.18 bears a reasonable relationship to having a good gas mask seal." *Id.* at 646-647. This point is significant and bears elaboration. Appellant did not introduce any physical evidence showing that a seal between a mask and the wearer's face is less likely to form if the wearer has sideburns not permitted by Section 4.18 than if he has sideburns which comply with the requirements of Section 4.18.* In the absence of such evidence, the requirements of Section 4.18 are arbitrary in the sense that the line of demarcation between sideburns that are permitted and those that are not bears no relationship to whether or not a seal would form between a mask and the face of the sideburned wearer.

As to the argument that Section 4.18 is justified because a struggling opponent might grab a State Policeman's hair,

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(Footnote continued from preceding page)

ance." 391 F.Supp. at 647. *Compare Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 653 (1974) (concurring opinion, Powell, J.):

> The records before us abound with proof that a principal purpose behind the adoption of the regulations was to keep visibly pregnant teachers out of the sight of school children. The boards do not advance this today as a legitimate objective, yet its initial primacy casts a shadow over these cases. Moreover, most of the after-the-fact rationalizations proposed by these boards are unsupported in the records.

* The only technical evidence on the gas mask issue, American National Standards Institute, Inc., "American National Standard Practices for Respiratory Protection" (August 11, 1969), appellant's Exhibit 3, suggested that *any* sideburns may prevent an effective seal. 391 F.Supp. at 647 n.8.

the District Court found that this factor was not reasonably related to Section 4.18. It stated:

> Since the key to this danger is the amount of hair available to grip, the fact that the section does not regulate length of hair on top of the head undercuts this justification. Furthermore, it would seem that hair worn at collar length could be grasped almost as easily as hair worn a little bit longer. If the state police truly considered this a safety factor, the regulation would require hair to be worn much shorter than collar length.
>
> *Id.* at 647.

In addition, it noted:

> Furthermore, an assailant could grasp the length of hair permitted by the regulation. If this was a serious factor, the regulation would only permit very short haircuts.
>
> *Id.* at 647 n.9.

In short, the District Court clearly found that Section 4.18 was neither intended nor drafted to eliminate the possibility of a struggling opponent using the State Policeman's hair to aid his struggle and that it does not in fact do so.

Finally, the District Court rejected appellant's contention that Section 4.18 is reasonably designed to prevent hair from falling over a State Policeman's eyebrows and thus interfering with his sighting of a gun. Not only did the court find this testimony to be "highly speculative", but also it observed that there were "other simpler ways to handle this problem." *Id.* at 647.

The District Court's findings of fact with respect to the foregoing clearly establish that Section 4.18 is not reasonably related to safety. Significantly, appellant has not shown in his Jurisdictional Statement that the findings are erroneous in light of the record.

2. Discipline.

With respect to this asserted justification for Section 4.18, suffice it to say, in the words of the District Court, that "[n]o testimony explained precisely how Section 4.18 accomplishes the end of discipline." *Id.* Appellant has simply not demonstrated that this ruling is erroneous.

3. Public Cooperation.

Again, the District Court found that this asserted interest had no support in the record. *Id.* Moreover, in this regard the court credited State Policeman Kleinsmith's testimony to the effect that his personal appearance encouraged public cooperation with him, although his appearance was in violation of Section 4.18. *Id.*

Appellant's argument, therefore, is deficient in two respects. Not only has he failed to demonstrate a factually sound position, but he has also failed to show that the District Court's findings are erroneous. He apparently takes the view that the mere *assertion* of the interests of safety, discipline and public cooperation is enough to justify Section 4.18. Clearly, however, this is not enough. Rather, it is well established that in order to justify an infringement of an individual's constitutional rights by the state, as in the case of Section 4.18, there must be *evidence* establishing that the challenged state action is reasonably related to a legitimate state interest. *See, e.g., Roe v. Wade, supra,* 410 U.S. at 155-56; *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 640 (1974).

In sum, standards which infringe personal liberty without reasonable justification and which appear to give rise to technical, if not punitive, citations of violation of the standards by competent and dedicated career police officers have

no place in our system of government. The District Court's action in striking down Section 4.18 was clearly correct.

III. Appellee's right to bring this action has not been waived.

Appellant contends that appellee's right to challenge the constitutionality of Section 4.18 was waived by the union which served as collective bargaining agent for State Policemen of appellee's rank while Section 4.18 was being drafted. This contention is based solely on the fact that before Section 4.18 was promulgated the president of the union sent to appellant a letter which stated that the executive committee of the union "concurs with the majority of the proposed changes." Appellant's Exhibit 10, Tr. 114-15.

The District Court held that this fact was insufficient to prove a waiver under the standard stated in *D. H. Overmyer Co. v. Frick Co., supra.* 391 F.Supp. at 644. On the record in this case, the holding is clearly correct.

First, there is no evidence that appellee personally authorized the executive committee of the union to approve Section 4.18 on his behalf. Also, there is no proof that he was consulted by the executive committee before the letter in question was sent or even that he was aware a regulation governing personal appearance was being considered by appellant and the union.

Furthermore, appellant has not shown that the executive committee of the union was empowered to waive appellee's constitutional right to style his personal appearance. No provision of the union's constitution or by-laws is cited by appellant as having given the executive committee this power either explicitly or implicitly. Moreover, contrary to appellant's assertion, the collective bargaining agreement

between the union and the State of New York which was in force when Section 4.18 was being drafted also did not do so.*

Article III of the collective bargaining agreement stated in pertinent part:

> It is understood and agreed that management possesses the sole right to conduct the State's business and to carry out its obligations and that all management rights repose in it, but that *such rights are subject to such conditions, requirements and limitations as may be applicable under law,* and must be exercised consistently with the other provisions of this Agreement. These rights include but are not limited to the following:
>
> • • •
>
> 7. To make rules, regulations and policies concerning personnel procedures and practices, subject, however, to the procedures described in Article XVI of this Agreement. (Emphasis added.)

Article XVI stated in full that "[t]he Superintendent of State Police will consult with [the union] prior to promulgation of all memoranda and changes in the Rules and Regulations of the Division affecting the terms and conditions of employment."

Under these provisions, the union had to be consulted about changes such as that made by Section 4.18, but its approval was not required before the changes could be made. More importantly, however, even after consultation

* The collective bargaining agreement, entitled "Agreement Between the State of New York and the Police Benevolent Associaition of the New York State Police, Inc. for the Unit Consisting of All Non-commissioned Officers, Investigators and Troopers of the Division of State Police, 1971-1973", was not introduced into evidence by appellant at the hearing in this case, but was made available to the District Court by his counsel.

with the union (and perhaps obtaining its approval) the Division of State Police could only make changes "subject to such conditions, requirements and limitations as may be applicable under law . . . ." In other words, rather than empowering the union to waive State Policemen's legal rights (including constitutional rights), the collective bargaining agreement itself prohibited promulgation of any rule relating to personnel which was contrary to law (including constitutional law).

Finally, even if the collective bargaining agreement empowered the union to waive appellee's constitutional right to style his personal appearance, the union did not do so on the facts of this case. The letter sent to appellant by the president of the union clearly indicates that the executive committee of the union did not approve of Section 4.18 as it was ultimately promulgated. It proposed a change in the permissible length of sideburns, a proposal rejected by appellant. Appellant's Exhibits 10, 11, 12, Tr. 114-17.

Thus, on the facts appearing in the record, the District Court was plainly correct in holding that this action is not barred on the ground that appellee's constitutional right to style his personal appearance has been waived. Appellant invites this Court to "presume acquiescence in the loss of fundamental rights." *Ohio Bell Telephone Co. v. Public Utilities Comm'n,* 301 U.S. 292, 307 (1937), quoted in *D. H. Overmyer Co. v. Frick Co., supra,* 405 U.S. at 186. The invitation should be declined.

Conclusion

The questions raised by appellant do not require this Court's plenary review, and the judgment below should be summarily affirmed. Alternatively, in light of this Court's recognition of the importance of the issues raised in this case by reason of its grant of certiorari in *Dwen v. Barry*, No. 74-1269 (certiorari granted May 27, 1975), appellee respectfully suggests that it may be appropriate for this Court to order the two cases argued together as one case pursuant to Rule 43(5) of the Rules of this Court.

Dated: August 15, 1975.

Respectfully submitted,

MICHAEL J. HUTTER,
Western New England Law School,
1215 Wilbraham Road,
Springfield, Massachusetts 01119,

CHRISTIAN G. KOELBL III,
1800 One M & T Plaza,
Buffalo, New York 14203,

Attorneys for Appellee.